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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

PLATO E. PAPPS
1300 Connecticut Ave., N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Bldg., N. W.
Washington 6, D. C.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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1. The primary purpose of this reply brief is to present an additional question. We realize that this is an unusual step but we believe that unusual circumstances exist which justify it.

The additional question we wish to present is as follows:

> Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits a union from having an employer placed on a "We Do Not Patronize" list and from appealing directly to customers not to trade with the employer in order to secure recognition of the union as the employees'

exclusive bargaining representative at a time when the union does not represent a majority of the employees within the appropriate unit.

While petitioner prevailed in the court below on this question, the court finding that the conduct was "within the general area of protection of the 1st amendment guarantying freedom of speech" (Pet. for Cert. p. 7a), petitioner nevertheless has standing to raise the question. 28 U.S.C. § 1254(1) provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of *any* party to any civil or criminal case, before or after rendition of judgment or decree" (emphasis supplied). Since standing extends to *any* party, if is not limited to the party who did not prevail below. Especially would this appear to be true where, as here, petitioner prevailed in part and lost in part, and petitioner seeks to raise both the adverse and favorable parts of an interrelated determination. And it is to be observed that this additional question is presented within ninety days from the rendition of judgment.

In its opposition the Board states that it "has decided not to seek certiorari in the instant case with respect to the court of appeals' holding on the 'We Do Not Patronize' list and the customer appeals" (p. 5). Yet on April 2, 1959, more than three weeks before the instant petition was filed on April 24, 1959, the Board publicly announced that it does not acquiesce in the determination of the court below and will seek review by this Court. Thus it stated in *Louisville Cap Co.*, 123 NLRB No. 74, 43 LRRM 1475, 1477, n. 2, that:

> Drivers, Chauffeurs and Helpers Local 639 (Curtis Brothers) 119 NLRB 232, 41 LRRM 1025,

enforcement denied F. 2d , 43 LRRM 2156 (C.A.D.C.); International Association of Machinists (Alloy Manufacturing Company) 119 NLRB 307, 41 LRRM 1058, enforcement denied in part F. 2d (C.A. 9). We do not acquiesce in the opinion of the court of appeals in the Curtis Brothers case respecting the legality of recognitional picketing and of that of the court of appeals in Alloy Manufacturing Company case respecting the legality of a consumer appeals and a product boycott in a like situation to that presented here. With all due respect for the opinions of the courts in those cases, we do not adopt their conclusions until the Supreme Court has had an opportunity to rule on these issues.

Accordingly, while declining to acquiesce in the merits of the determination below until this Court "has had an opportunity to rule," the Board nevertheless declines to seek the review which it professes to await. And we understand that the decision not to cross-petition in this case does not rest upon an abandonment by the Board of the merits of its position.

There are presently three cases pending in the Courts of Appeals which present this additional question. Two are in the Court of Appeals for the District of Columbia Circuit, one in which the record has not yet been filed,[1] and the other[2] in which the Board is about to move the Court of Appeals to stay further proceeding pending this Court's decision in *National Labor Relations Board v. Drivers Local Union No. 639*, No.

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[1] *United Hatters, Cap & Millinery Workers Union* v. *National Labor Relations Board*, C.A.D.C. No. 15087 (*Louisville Cap Co.*, 123 NLRB No. 74, 43 LRRM 1475).

[2] *International Association of Machinists, Local Lodge No. 311, et al.* v. *National Labor Relations Board*, C.A.D.C. No. 14,818 (*Machinery Overhaul Co.*, 121 NLRB No. 153).

717, October Term 1958, the latter being the case which presents the picketing aspect of the question. Since the Court of Appeals has twice before, over objection, stayed proceedings in pending cases to await this Court's decision in *Drivers Local Union No. 639*,[3] there is every reason to suppose that it will continue to do the same. The third case is before the Court of Appeals for the Fourth Circuit,[4] and while it was argued on March 9, 1959, there is good reason to believe that the Fourth Circuit may withhold its decision pending this Court's decision in *Drivers Local Union No. 639*. Consequently, the instant case is the single one which presents the additional question and which is now ripe for review. And it is especially appropriate that this be the case in which the question is reviewed, for it is in this case that the Board first announced this aspect of its doctrine.

In *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term 1958, this Court granted the writ to review the aspect of the question which pertains to picketing. The additional question we seek to present raises the aspect of the question which pertains to a "We Do Not Patronize" list and customers appeals. Thus the additional question presents the second branch of the same question upon which the writ has already been granted. The difference between the branches is that picketing, while it is speech, is also more than speech, whereas publica-

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[3] *Joint Council of Sportswear Workers* v. *National Labor Relations Board*, C.A.D.C. No. 14486 (*Haron and En Tour*, 120 NLRB 659); *Retail Store Employees Union, Local 1595* v. *National Labor Relations Board*, C.A.D.C. No. 14557 (*J. C. Penney Co.*, 120 NLRB 1535).

[4] *National Labor Relations Board* v. *United Rubber Workers*, C.A. 4 No. 7781 (*O'Sullivan Rubber Corp.*, 121 NLRB No. 185).

tion of a "We Do Not Patronize" list in a newspaper and asking customers in oral conversations not to trade with a nonunion firm constitute pure speech. Sound decision on both branches of the question would be enhanced were the Court to have before it at the same time the full sweep of the Board's pioneer interpretation of Section 8(b)(1)(A). And it goes without saying that the pure speech aspect of the question is important and recurring.

2. The Board seeks to avoid review of the action of the court below in declining to reach the merits of the picketing aspect of the question upon the basis of considerations which are dubious to say the least.

(a) The Board suggests that the court below exercised a "permissible" judgment in declining to reach the merits (p. 6). But the determination of the court below did not rest upon an exercise of discretion but was based on its view that it had no power to review the merits. For the court stated that, in the absence of exceptions by petitioner to the trial examiner's intermediate report, the merits of the question "cannot be entertained by us" (Pet. for Cert. p. 4a), and "leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*id.* at 5a).

(b) That the decision below could not rest upon an exercise of discretion is evident from the meritless reasons now assigned by the Board for the first time to justify such an exercise. The Board admits that it "elected to affirm on substantive grounds" despite the absence of exceptions (p. 5). But it suggests that it "has not had the benefit of full argument of the issues" and the reviewing court "does not have the benefit of the Board's informed judgment . . ." (p. 6). This is an extraordinary evaluation of the posture of this case.

The Board affirmed on the merits on the authority of its contemporaneous decision in *Curtis Brothers*, 119 NLRB 232, certiorari granted *sub. nom. National Labor Relations Board v. Drivers Local Union No. 639*, No. 717, October Term 1958. *Curtis* is a companion to this case and was decided four days before. The majority opinion in *Curtis* runs to fifteen pages (*id.* at 232-247), the concurring opinion to eight pages (*id.* at 248-256), the dissenting opinion to ten pages (*id.* at 256-265), and the intermediate report to eleven pages (*id.* at 266-267). The competing considerations could hardly have been more fully aired and exposed.

Nor was the court below without enlightenment. The Board's brief below, copies of which have been filed with this Court, devoted 26 pages to a full discussion of the question (pp. 15-41), and reproduced the majority, concurring, and dissenting opinions in *Curtis* in a 55 page appendix (pp. 49-104). Petitioner's brief below devoted 33 pages to the question (pp. 9-42), plus a three-page appendix (pp. 59-61). And in the course of oral argument the court below *sua sponte* granted counsel additional time.

It is fair to say that the merits of the issue could not have been more fully explored by the Board or in the court below.

(c) The Board suggests that the procedural question is unimportant. But the Board does (Pet. for Cert. p. 11 and n. 2), as its rules permit (*id.* at p. 11 and n. 1), decide the merits of a particular issue to which no exception is taken if the case is before it on any exceptions. It does so in important cases, as witness the instant case and *International Rice Milling Co., Inc.*, 84 NLRB 360, later decided by this Court, 341 U. S. 665. The question is therefore necessarily

recurrent. And since Section 10(e) finds its counterpart in numerous regulatory statutes, the question cuts across judicial review of administrative determinations generally.

Respectfully submitted,

PLATO E. PAPPS
1300 Connecticut Ave., N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Bldg., N. W.
Washington 6, D. C.
Attorneys for Petitioner.

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